Legasri a/p Purana Chandran @ Maniam (w) v Sreepathy a/l Ganapathy Krishnan Iyer (h)

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITON NO S33–1375 OF 2006
YEOH WEE SIAM JC
8 APRIL 2010

Civil Procedure — Affidavits — Affidavit in reply — Failure to file — Failure to reply opponent's affidavit — Whether constituted admission of facts set out in opponent's affidavit

Civil Procedure — Contempt of court — Party in contempt — Right to be heard — Whether party in contempt could be heard in proceedings whilst still in contempt — Whether party in contempt ought to first purge contempt — Discretion of court to allow party in contempt to be heard whilst still in contempt, how exercised

Family Law — Children — Custody — Power of court to vary orders for custody — Whether welfare of child paramount consideration — Mother uprooting child from familiar surroundings and routines — Mother absconding with child and fleeing from country to country — Child living together with mother and unknown cohabiting partner — Whether such circumstances detrimental to child's welfare — Whether custody order ought to be varied to grant sole guardianship and custody to father — Law Reform (Marriage and Divorce) Act 1976 ss 96 & 97

Family Law — Divorce — Decree nisi granted — Variation of terms in decree nisi — Material change in circumstances — Husband and wife granted joint guardianship and custody of child in decree nisi — Wife denying husband access to child — Wife absconding with child — Whether material change in circumstances justifying variation in terms of decree nisi

Family Law — Divorce — Maintenance — Husband ordered to pay wife maintenance — Material change in circumstances caused by wife abruptly leaving jurisdiction — Whether sufficient justification for husband to cease paying maintenance

Husband ('H') and wife ('W') jointly obtained a decree nisi ('the decree') dissolving their marriage. The decree granted H and W joint guardianship

and joint custody of their only child ('the child'). H was granted liberal access to the child. W later applied to vary the decree to obtain sole custody of the child and to restrict H's access to the child, but her application was dismissed. In violation of the terms of the decree, W subsequently absconded with the child, thereby denying H all access to the child. H applied ex parte (encl 49) for, inter alia, orders enabling the recovery of the child and to vary the decree. H obtained an ad interim order pending the inter partes hearing of his application. At the inter partes hearing, counsel for H raised a preliminary objection to the effect that W ought not be heard on the application since she was in contempt of the decree.

Held, allowing the application in encl 49 with costs in cause:

(1) The general rule as stated in *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 is that a party in contempt cannot be heard until that party has purged his contempt. However, an exception exists that allows a person in contempt and out of the jurisdiction to be heard in defence, at the court's discretion, where there is an appeal against any order made against that person. This exception is not cast in stone so as to fetter the court's discretion (see para 14). *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 followed; *Hadkinson v Hadkinson* [1952] 2 All ER 567; [1952] P 285 followed; *Gordon v Gordon and Gordon (co-respondent)* [1904] P 163 followed.

(2) In the instant case, there was strong justification, based on grave consideration of public policy not to allow W to be heard in the inter partes proceedings on encl 49. W remained in contempt for: (a) leaving the jurisdiction with the child in breach of the decree that required both H and W to give notice of their intention to take the child out of the jurisdiction; (b) denying H any access to the child in violation of the terms on access set out in the decree; (c) disobeying other orders of court compelling the child's return to the jurisdiction. The court could not exercise its discretion in favour of W in allowing her to be heard in the proceedings, until she returned, produced the child and purged her contempt. W clearly intended to frustrate and deny H all contact and access to his daughter in direct violation and total disregard of the terms of the decree, as well as the other orders. W's act of taking the child out of jurisdiction prima facie constituted 'a contempt of the grossest kind' (see para 20, 23–24); *Hadkinson v Hadkinson* [1952] 2 All ER 567; [1952] P 285 followed.

(3) W had not filed any affidavit to reply H's affidavit. Thus there was an admission by W to the facts as set out by H in his affidavit. H's application was necessary: (a) for the child's protection; (b) to ensure the child was returned to the court's jurisdiction; to enable H to enforce

the decree and the orders of court (see para 28(a) & (b)); *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 referred.

(4) In the instant case, H was entitled to vary the decree nisi as there had been a material change in the circumstances that necessitated a variation to the terms of the decree, in that: (a) H had not been provided the liberal access to the child as prescribed by the decree; (b) despite the court orders requiring the child's return, W continued to keep the child out of the jurisdiction (see para 30).

(5) H was also entitled to vary the decree on the issue of the child's custody pursuant to s 97 of the Law Reform (Marriage and Divorce) Act 1976. On the facts it was for the welfare of the child that H be granted sole custody. W had proven herself unreliable and untrustworthy with regard to her obligations under the decree. W's actions in denying H all access to the child was unreasonable and detrimental to the child's welfare. W clearly did not have the welfare of the child as the paramount consideration. It was not for welfare of the child: (a) for the child to be uprooted from her home and familiar routines; (b) to be living together with W's unknown cohabiting partner; (c) to be fleeing from one country to the other indefinitely (see para 30(c), (d), (e), (f) & (g)).

(6) Since sole guardianship and custody of the child ought to be granted to H, there should be a consequential order that H cease to pay maintenance for the child. There was however no justification for the court to allow H's application to cease paying maintenance for W as a result of the material change in the circumstances caused by W leaving the court's jurisdiction (see para 32(a), (b) & (c)).

[Bahasa Malaysia summary

Suami ('S') dan isteri ('I') secara bersama mendapatkan dikri nisi ('dikri') membubarkan perkahwinan mereka. Dikri tersebut memberikan S dan I hak penjagaan bersama anak tunggal mereka ('anak'). S diberikan akses bebas dan terbuka kepada anak tersebut. I kemudiannya memohon untuk mengubah dikri tersebut untuk mendapatkan hak jagaan tunggal anak tersebut dan menghadkan akses S ke atas anak itu, tetapi permohonannya ditolak. Melanggar terma-terma dikri tersebut, I kemudiannya membawa lari anak tersebut, maka menafikan hak S ke atas akses anak tersebut. S memohon secara ex parte (lampiran 49), antara lain, untuk perintah membenarkan pengambilan semula anak tersebut dan untuk mengubah dikri tersebut. H memperoleh perintah ad interim sementara menunggu pendengaran inter partes permohonannya. Pada masa pendengaran inter partes, peguam S membangkitkan bantahan awal bahawa I tidak sepatutnya di dengar dalam permohonan tersebut kerana dia menghina dikri tersebut.

Diputuskan, membenarkan permohonan dalam lampiran 49 dengan kos mengikut kausa:

(1) Peraturan am yang dinyatakan dalam *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217 bahawa pihak yang menghina mahkamah tidak boleh didengar sehingga pihak itu membersihkan penghinaannya. Walau bagaimanapun, wujud pengecualian yang membenarkan seseorang yang menghina mahkamah dan di luar bidang kuasa didengar pembelaannya, atas budi bicara mahkamah, di mana terdapat rayuan terhadap sebarang perintah yang dibuat terhadap orang tersebut. Pengecualian ini tidak muktamad untuk membelenggu budi bicara mahkamah (lihat perenggan 14); *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; *Hadkinson v Hadkinson* [1952] 2 All ER 567; [1952] P 285 diikut; *Gordon v Gordon and Gordon (co-respondent)* [1904] P 163 diikut.

(2) Dalam kes ini, tiada justifikasi yang kukuh, berdasarkan pertimbangan serius terhadap polisi awam, untuk tidak membenarkan I didengar dalam prosiding inter partes lampiran 49. I tetap menghina mahkamah kerana: (i) keluar dari bidang kuasa bersama anak itu yang melanggar dikri tersebut yang memerlukan S dan I memberikan notis niat mereka untuk membawa anak tersebut ke luar bidang kuasa; (ii) menafikan S akses terhadap anak itu adalah melanggar terma-terma akses yang dinyatakan dalam dikri tersebut; (iii) tidak mematuhi perintah-perintah lain mahkamah memaksa pemulangan anak itu ke dalam bidang kuasa, sehingga kepulangannya, membawa anak itu dan membersihkan penghinaannya. I jelasnya ingin menghalang dan menafikan S semua hubungan dan akses terhadap anak perempuannya yang melanggar dan tidak mempedulikan terma-terma dikri tersebut, dan juga ke atas perintah-perintah lain. Tindakan I membawa anak itu ke luar bidang kuasa adalah prima facie 'a contempt of the grossest kind' (lihat perenggan 20, 23–24); *Hadkinson v Hadkinson* [1952] 2 All ER 567; [1952] P 285 diikut.

(3) I tidak memfailkan sebarang afidavit untuk membalas afidvit S. Maka terdapat pengakuan I ke atas fakta-fakta yang dinyatakan dalam afidavit S. Permohon H adalah penting untuk: (i) perlindungan anak itu; (ii) menjamin anak tersebut dipulangkan ke dalam bidang kuasa mahkamah; untuk membolehkan S menguatkuasakan dikri tersebut dan perintah-perintah mahkamah (lihat perenggan 28(a) & (b)); *Ng Hee Thong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 dirujuk.

(4) Dalam kes ini, S berhak untuk mengubah dikri nisi kerana adanya perubahan material dalam keadaan yang memerlukan perubahan terma-terma dikri, iaitu: (i) S tidak diberikan akses bebas dan terbuka kepada anak tersebut seperti yang diperuntukkan dalam dikri tersebut;

(ii) walaupun mahkamah memerintahkan pemulangan anak itu, I tetap membiarkan anak tersebut di luar bidang kuasa (lihat perenggan 30).

(5) S juga berhak untuk mengubah dikri atas isu jagaan anak tersebut berikutan s 97 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976. Atas fakta-fakta, adalah untuk kebajikan anak itu agar S diberikan hak jagaan tunggal. I telah membuktikan bahawa dia tidak boleh diharap dan tidak boleh dipercayai berkenaan tanggungjawabnya di bawah dikri tersebut. Tindakan I menghalang S akses terhadap anak tersebut adalah tidak wajar dan menjejaskan kebajikan anak tersebut. I jelas tidak memikirkan kebajikan anak tersebut sebagai pertimbangan utama. Bukanlah untuk kebajikan anak tersebut: (i) bagi anak itu disingkirkan dari rumahnya dan rutin kebiasaannya; (ii) bagi anak itu tinggal bersama pasangan bersekedudukan I yang tidak dikenali; (iii) melarikan diri dari satu negara ke negara lain bagi tempoh masa yang tak pasti (lihat perenggan 30(c), (d), (e), (f) & (g)).

(6) Memandangkan hak penjagaan tunggal anak tersebut harus diberikan kepada S, sepatutnya ada perintah berbangkit bahawa S tidak perlu lagi membayar nafkah anak tersebut. Tetapi tiada justifikasi bagi mahkamah untuk membenarkan permohonan S supaya tidak perlu lagi membayar nafkah I kerana perubahan material dalam keadaan yang diakibatkan oleh I meninggalkan bidang kuasa mahkamah (lihat perenggan 32(a), (b) & (c)).]

Notes

For a case on party in contempt, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) para 1841.

For cases on affidavit in reply, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 319–330.

For cases on custody, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3078–3123.

For cases on grant of decree nisi, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3286–3288.

For cases on maintenance, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3406–3437.

Cases referred to

Gordon v Gordon and Gordon (co-respondent) [1904] P 163, CA (folld)

Hadkinson v Hadkinson [1952] 2 All ER 567; [1952] P 285, CA (folld)

Leong Sam Moy v Low Chee Thiam [472] MD 7; [1997] 2 CLJ Supp 212, HC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA (refd)

Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal [1993] 2 MLJ 217; [1993] 3 CLJ 210, SC (folld)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 83, 84, 88, 96, 97
Rules of the High Court 1980 O 52

YN Foo (Kiran Dhaliwal with her) (YN Foo & Partners) for the petitioner husband (applicant).
Balwant Singh Sidhu (CS Ong with him) (Siong & Rita) for the petitioner wife (respondent).

Yeoh Wee Siam JC:

[1] This is an appeal by Legasri a/p Purana Chandran @ Maniam, the petitioner wife ('the wife') against my decision made in chambers on 3 March 2010 in respect of encl 49.

[2] Enclosure 49 is an application by the applicant ie Sreepathy a/l Ganapathy Krishna Iyer, the petitioner husband ('the husband'), for the following orders:

1. Variation of the Decree Nisi dated 13.11.2006 that —

   (a) the Petitioner Husband, SREEPATHY A/L GANAPATHY KRISHNA IYER (No. K/P: 680513-10-7113) shall be granted sole guardianship, custody, care and control of the child of the marriage namely, Adrika Sreepathy Iyer (Birth Certificate No.: BE 63020) ('the child');

   (b) the Petitioner Husband shall retain the international passport of the child.

   (c) the Petitioner Husband shall cease forthwith to pay maintenance for the child to the Petitioner Wife.

   (d) the Petitioner Husband shall cease forthwith to pay maintenance for the Petitioner Wife of RM1,000 per month.

2. That the Petitioner Wife, LEGASRI A/P PURANA CHANDRAN @ MANIAM (p) (No. K/P: 740228-08-5172) produce the child, ADRIKA SREEPATHY IYER, and hand the child, ADRIKA SREEPATHY IYER to the Petitioner Husband, forthwith upon service of this Order, to be brought by the Petitioner Husband back into Malaysia.

3. That any person, who is in a position, to produce the child, ADRIKA SREEPATHY IYER, and hand the child, ADRIKA SREEPATHY IYER to the Petitioner Husband, forthwith upon service of this Order, to be brought by the Petitioner Husband back into Malaysia.

4. That the Petitioner Husband be authorised to remove the child, ADRIKA SREEPATHY IYER from the Petitioner Wife's control.

5. That any person who has information as to the child, ADRIKA SREEPATHY IYER's whereabouts shall disclose that information to the Petitioner Husband.

6. Alternatively, that any police officer or any other authorised person which authorised person shall include an officer of the Malaysian Embassy, be authorised to enter into the residence of the Petitioner Wife and/or to enter into any other place where the Petitioner Wife is situated, and search for the child, ADRIKA SREEPATHY IYER, using reasonable force if necessary.

7. That any police officer or any other authorised person which authorised person shall include an officer of the Malaysian embassy, be authorised to do the following:

   a. To assist the Petitioner Husband, to obtain custody and control of the child, ADRIKA SREEPATHY IYER from any place wherein the child ADRIKA SREEPATHY IYER may be found.

   b. That the said police officer in executing the Order be further authorised to search for the child, ADRIKA SREEPATHY IYER in the place to which admittance has been obtained.

8. That the Petitioner Wife either by herself, and/or her agents and/or her servants be restrained from taking the child, ADRIKA SREEPATHY IYER, out of Malaysia.

9. That the Petitioner Wife have access to the child, ADRIKA SREEPATHY IYER, under the supervision of the Petitioner Husband at his residence on Sunday, from 2.00 p.m. to 4.00 p.m.

10. That notice of this Order be given to the Jabatan Imigresen Malaysia by being provided with a certified true copy of this Order.

11. That the said child's international passport be handed over to the Petitioner Husband forthwith upon service of this Order;

12. That costs of this application be paid by the Petitioner Wife in any event.

The grounds of this application are:

a. The Petitioner Wife has without the knowledge and/or consent of the Petitioner Husband surreptitiously removed the child of the marriage out of this jurisdiction and remains out of this jurisdiction till to date;

b. The Petitioner Wife's actions aforesaid is in direct contravention of Clause 3 of the said Decree Nisi, wherein in the event either party

intends to take the child overseas, notice of at least two (2) days shall be given to the other party of the said intention;

c. Since June 2009, the Petitioner Husband has no knowledge and/or information with regards to the whereabouts of the Petitioner Wife and the said child;

d. The Petitioner Wife has been misleading even this Honourable Court as to her whereabouts;

e. As a result of the Petitioner Wife's absconding from this jurisdiction with the said child, the Petitioner Husband is currently experiencing severe anxiety not knowing of his daughter's wellbeing;

f. The Petitioner Wife has denied the Petitioner Husband all access to his daughter since 29.1.2008 including even telephone access.

[3] The detailed grounds of the application in encl 49 are set out in the affidavit of the husband affirmed on 4 November 2009.

BACKGROUND FACTS

[4] The background facts as submitted by Ms Kiran Dhaliwal, learned counsel for the husband, are as follows:

20.8.2000- Date of marriage.

27.5.2003- Only child of the marriage, Adrika born, now 6 + years old.

May 2006- Parties separated.

18.10.2006- Joint Petition filed.

13.11.2006- Decree Nisi, both Husband Petitioner and Wife Petitioner were granted (by consent) *Joint Guardianship and Joint Custody of the child of the marriage* namely, Adrika Sreepathy Iyer and liberal access to the Husband Petitioner.

See: Exhibit 'S-1' to the Husband Petitioner's Affidavit in Support affirmed on 4.11.2009

3.11.2007 - Wife Petitioner filed SIC to vary Decree Nisi, such that Wife be given sole custody of Adrika, and Husband's access to Adrika be restricted. This application was dismissed on 30.12.2008.

29.1.2008- Petitioner Husband has been denied all access to the child, even telephone access.

8.4.2009- Petitioner Husband filed application for an appointment of a psychologist to facilitate access [Enclosure 35].

12.6.2009- Wife affirms an affidavit in reply with regards to Enclosure 35.

15.6.2009- *3 days later, Wife Petitioner absconded with child out of this jurisdiction in breach of the terms of the Decree Nisi. Husband not informed*.

19.6.2009- 4 days later, Hearing of Enclosure 35, Court granted Order in terms of Husband's application for an appointment of a psychologist to facilitate access.

18.8.2009- Husband Petitioner's solicitors wrote to Wife Petitioner solicitors seeking confirmation of the whereabouts of the Wife Petitioner and the child.

20.8.2009- Husband Petitioner received confirmation from the Embassy of Malaysia in Bangkok that the Wife Petitioner had taken flight from Bangkok to a destination in the Middle East.

2.10.2009- Solicitors for Husband Petitioner informed Court the Wife Petitioner had absconded from this jurisdiction taking the child with her.

Wife's solicitors informed Court he had no knowledge of client's whereabouts, only that she 'left' and that he had specific instructions not to reveal client's whereabouts.

14.10.2009- Solicitors for both Husband Petitioner and Wife Petitioner appeared before this Honourable Court. Solicitor for Wife Petitioner informed Court that Wife Petitioner and child are in Australia. Solicitors for Husband Petitioner provided evidence to confirm that Wife Petitioner and child in fact not in Australia.

4.11.2009- The Husband Petitioner was compelled to file an ex-parte application [Enclosure 49] seeking inter alia, the recovery of his daughter, Adrika.

20.11.2009- At the ex-parte Hearing of Enclosure 49, the Honourable Court granted orders to enable the Petitioner Husband to seek the recovery of his daughter Adrika.

See: Court Order dated 20.11.2009 at TAB 1

10.12.2009- Enclosure 49 was fixed for Hearing with the presence of solicitors for both parties respectively. Solicitors for the Wife, while still refusing to reveal the Wife's whereabouts, informed the court that he had been short-served and hence the matter should be adjourned to another date. Further, Wife's solicitors indicated that he had instructions to appoint counsel. He nevertheless informed the Court that he had no objections to an interim order. Hence the Court granted an ad interim order until the hearing of the matter.

See: Court Order dated 10.12.2009 at Tab 2

[5] Enclosure 49 was fixed for inter partes hearing before me on 3 March 2010.

PRELIMINARY OBJECTION

[6] Learned counsel for the husband raised a preliminary objection, namely, that until the day of the inter partes hearing, the wife remains in contempt and has not taken steps to purge her contempt.

[7] Contempt of court is governed by O 52 of the Rules of the High Court 1980, but that provision is regarding enforcement and committal. A

[8] The issue here is whether the wife, who is in contempt of the court order dated 13 November 2006, should be heard by this court regarding encl 49. Learned counsel for the husband cited the following authorities in support of her preliminary objection: B

[9] In *Wee Choo Keong v MBf Holdings Bhd & Anor and another appeal* [1993] 2 MLJ 217; [1993] 3 CLJ 210 the Supreme Court held, inter alia: C

> [1] There are no exceptions per se to the general rule that a party in contempt cannot be heard until he has purged his contempt ... The rationale for the rule is public policy. Orders of court are to be treated with respect and require strict obedience. D
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> [2] Although the right to be heard is a fundamental right vested in all litigants, where the litigant shows himself to have little or no regard to an order issued against him, then he has to a certain extent forfeited his right to be heard or at least postponed that right until he has suitably purged his contempt. E

[10] Learned counsel for the husband also cited what His Lordship Abdul Hamid Omar (as he then was) stated in the same case:

> It is established law that a person against whom an order of court has been issued is bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order runs the risk of being held in contempt with all its attendant consequences. F
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> It has not been seriously disputed, and indeed we find that it is also an established general rule of law that a party in contempt cannot be heard in the same proceedings for his own benefit unless and until he has purged his contempt. G

[11] Learned counsel for the husband submitted that there are no exceptions to the above general rule of law based on what His Lordship further stated: H

> We are unable to accept that any exceptions per se exist to the general rule that a party in contempt cannot be heard until he has purged his contempt …
>
> Orders of court must be treated with respect and require strict obedience. I

[12] The Supreme Court in the above case referred to the case of *Hadkinson v Hadkinson* [1952] 2 All ER 567; [1952] P 285 at p 288 which case had set

out the general rule. *Hadkinson* was decided on facts very similar to those in this present case, in that:

(a) The mother had removed the child out of the jurisdiction;

(b) Notwithstanding orders that the child be returned, the mother had continued to remain out of the jurisdiction with the child.

[13] Mr Balwant Singh Sidhu, learned counsel for the wife, in his submissions, distinguished *Wee Choo Keong* from the present case. He contended that in *Wee Choo Keong* the person in contempt was making the application and therefore should not be heard by the court until he has purged his contempt. However, he pointed out that there is an only exception for a person in contempt who can be heard ie when such person has to defend himself. He cited *Hadkinson* at p 570 (where that case applied the same principle that was explained in *Gordon v Gordon and Gordon (co-respondent)* [1904] P 163) as follows:

> The only other exception which could in any way be regarded as material is the qualified exception which in some cases, entitles a person who is in contempt to defend himself when some application is made against him ... The nature and limits of this exception were explained by this court in *Gordon v Gordon* (3).

The background facts of *Gordon v Gordon* were explained by Romer LJ in *Hadkinson* as follows:

> In that case an order was made in divorce proceedings against the wife at the instance of the husband to hand over to him the child of the marriage, and she was ordered to pay the costs of the application out of her separate property notwithstanding that such property was subject to a restraint on anticipation. On the husband attempting to serve the order it was found that the wife had gone away with the child in spite of an undertaking which she had given not to do so. Thereupon a further order was made for the attachment of the wife for contempt and another order for her committal. These orders could not be put into effect, however, because the wife was abroad. She subsequently, whilst still in contempt, appealed against so much of the order first above mentioned as directed her to pay costs out of the property of hers which was subject to a restraint on anticipation. The court entertained her appeal on grounds which Vaughan Williams LJ expressed as follows [1904] P 171):
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> > ... taking it generally it has not been disputed in the discussion before us that this rule, that a person who is in contempt cannot be heard, prima facie applies to voluntary applications on his part — when he comes and asks for something, and not to cases in which all that he seeking is to be heard in respect of matters of defence.

[14] After considering the authorities cited by both parties, I agree with learned counsel for the husband that, based on *Wee Choo Keong*, a person in contempt cannot be heard by the court if he is making the application until he has purged his contempt. This is in compliance with the general rule, which has no exceptions, that was stated by the Supreme Court in that case. The rationale for such a general rule is very clear, namely, that the orders of a court must be treated with respect and require strict obedience. That is basically what 'the rule of law' means and requires. However, from a further reading of *Hadkinson*, which was cited partially in *Wee Choo Keong*, there is an exception to the general rule, namely, that the person in contempt, while still in contempt, or has not yet, or will not purge his contempt, and is still remaining in a country or place outside the jurisdiction of the court, may be allowed to be heard in defence, in particular in her appeal against any order made against her. I believe this principle is, however, not cast in stone so as to fetter the court's discretion on the matter.

[15] On the question whether to allow a person who is in contempt and who has not purged his contempt to be heard in defence (or in an appeal, for that matter), it is finally dependent on the court whether to exercise its discretion in that manner.

[16] The Supreme Court in *Wee Choo Keong* had approved and were in favour of the views expressed by Lord Denning in *Hadkinson*:

> … that it is a matter of discretion depending on the circumstances of the case whether or not a litigant ought to be heard notwithstanding his contempt.

[17] The above is consistent with what Vaughan Williams LJ further stated in *Gordon v Gordon* at pp 171 and 172 regarding contempt against a court order that has been made in exercise of its discretion:

> I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the court, and some one who is oppressed, or thinks he is oppressed by that order, appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt.

[18] From the above, it is clear that while Vaughan Williams LJ endorsed the exception to the general rule that a person in contempt may be heard in defence ie, in her appeal on another matter, it does not mean that such person should be heard regarding her application to challenge the exercise by the court of its discretion in making the order of contempt against him unless he has purged his contempt.

[19] While I appreciate the rationale in the above principles laid down by the Supreme Court in *Wee Choo Keong* and by Romer LJ in *Hadkinson*, and by Vaughan Williams LJ in *Gordon v Gordon*, finally, I decided to apply the modern rule as laid down by Lord Denning in *Hadkinson* at pp 574 and 575 where, with great wisdom, after he had analysed all the cases on whether a person in contempt ought to be heard by the court, took the following position:

> Those cases seem to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance ... I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his obedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.
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> The present case is a good example of a case where the disobedience of the party impedes the course of justice. So long as this boy remains in Australia, it is impossible for this court to enforce its orders in respect of him. No good reason is shown why he should not be returned to this country so as to be within the jurisdiction of this court. He should be returned before counsel is heard on the merits of this case, so that, whatever order is made, this court will be able to enforce it ... Until the boy is returned, we must decline to hear her appeal.
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> *July 29*. The child having been brought back into the jurisdiction, the court heard and allowed the appeal.

[20] Applying the above modern rule as laid down by Lord Denning, I decided that, in the present case, there is strong justification, based on the grave considerations of public policy, not to allow the wife to be heard in the inter partes proceedings before me regarding encl 49. The wife remains in contempt of this court as follows:

(a) On 15 June 2009 the wife left the jurisdiction of this court, in direct breach of cl 3 of the decree nisi of 13 November 2010 ('the decree nisi') which requires that either party provide notice of two days to the other party of their intention to take the child out of jurisdiction.

(b) The wife has also refused to allow the husband access to the child, as required by the same decree nisi. The husband has been denied all access to the child, even telephone access since 29 January 2008, for about two years. The wife is also in breach of the other terms of access as set out in the decree nisi.

[21] Thereafter, the husband was compelled to commence proceedings to recover the child and had obtained an ex parte order dated 20 November 2009 and an inter partes ad interim order dated 10 December 2009 for the child to be brought back to Malaysia. Despite both orders, and the wife's counsel appearing at the inter partes hearing (upon her instruction), the wife refused to inform the court of her and the child's whereabouts.

[22] The wife has remained outside the jurisdiction of the court, with the child. Learned counsel for the wife informed the court that the wife and child are in Qatar but learned counsel for the husband submitted that the husband does not know their address in Qatar.

[23] Although it is a matter of discretion, this court cannot exercise its discretion in favour of the wife in allowing her to be heard in these proceedings. The wife clearly intends to frustrate and deny the husband all contact and access to his daughter, Adrika, in direct violation and total disregard of the terms of the decree nisi, as well as the court orders dated 20 November 2009 and 10 December 2009 ('the two orders'). The act of taking the child out of jurisdiction prima facie constituted 'a contempt of the grossest kind' (as per Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at pp 569 and 571) and such act obstructs or impedes the course of justice.

[24] In the same manner that Lord Denning treated the case in *Hadkinson*, I decided that for as long as the wife is in contempt of this court and remains out of the jurisdiction of this court, she cannot be heard in her defence in these proceedings. Until she comes back, and produces the child, and purges her contempt, this court will not hear her.

[25] For the above reasons, I allowed the preliminary objection of learned counsel for the husband. In view of that, both learned counsel for the wife, on their own initiative, sought leave from the court and graciously left the court.

[26] The court then proceeded to hear the husband's application in encl 49.

DECISION ON ENCL 49

[27] After considering the submissions of both learned counsel for the husband, I allowed prayers 1(a), (b), (c) and 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 in encl 49 and ordered that costs be in the cause.

[28] The grounds for my decision are as follows:

(a) The wife has made no denials. To date, the wife has not filed any affidavit to reply the husband's affidavit. Accordingly, I accepted the submission by learned counsel for the husband that there is an admission by the wife to the facts set out in the husband's affidavit in support affirmed on 4 November 2009 (see Court of Appeal case *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281).

(b) There are very good grounds given by the husband in support of this application by reason of the wife's blatant disregard and breach of the decree nisi. The application is necessary:

(i) for the protection of the child, Adrika, who has been removed from the jurisdiction of this honourable court; and

(ii) to ensure that the child is returned to this jurisdiction and to the protective jurisdiction of this honourable court.

There is no way for the husband to enforce the decree nisi and the other two orders since neither Malaysia nor Qatar have signed the Hague Convention for reciprocal enforcement. The only way out is to enable the husband to enforce the decree nisi and the two orders by granting the appropriate prayers in the application and making the necessary further orders.

(c) This court has the power to make the orders sought in the application. This is because in cl 20 of the decree nisi, the parties had agreed that 'both parties be at liberty to make any application to this honourable court in future, if necessary'. Therefore, the husband is entitled to make this application to this court.

(d) The husband is allowed to apply for variation of the court's orders on custody or maintenance at any time under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA').

Section 96 of the LRA provides as follows:

> 96 Power for Court to vary orders for custody or maintenance
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> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[29] The question is whether there has been any material change in the circumstances that justifies a variation of the terms of the decree nisi.

[30] Here, I agree with the submissions of learned counsel for the husband that there has been a material change in the circumstances that necessitates a variation to be made to the terms of the decree nisi for the following reasons:

(a) The husband has not been provided the liberal access to the child as agreed upon by the parties and set out in the decree nisi.
The wife has, since 15 June 2009, absconded out of the jurisdiction of this honourable court, taking the child with her. Despite instructing her solicitors to appear in court to represent her, the wife refuses to divulge the whereabouts of the child to this honourable court.

(b) Despite the two court orders dated 20 November 2009 and 10 December 2009 that the child be returned to this jurisdiction, to be handed to the husband, the wife continues to keep the child out of the jurisdiction of this honourable court.

(c) Section 97 of the LRA provides as follows:

> The Court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do.

(See also ss 83 and 84 of the LRA on similar provisions to vary the agreements on maintenance for a wife where there is a material change in the circumstances).

Over and above the requirement of proof of a material change in the circumstances, based on s 97 of the LRA, the court may allow a variation of the decree nisi regarding the custody or maintenance of the child where it is satisfied that it is reasonable and for the welfare of the child so to do.

The paramount consideration of the court, in making an order for custody of a child, shall be the welfare of the child (see s 88 of the LRA).

On the facts of this case, it is for the welfare of this Malaysian child that the husband be granted sole custody and that the child be returned to the jurisdiction of this honourable court. The wife, by her acts of contempt of the court orders, has proven herself to be unreliable and untrustworthy in relation to her obligations as required by the terms in the decree nisi. As such, it is reasonable and for the welfare of the child that the relevant terms of the decree nisi be varied from that of joint custody of the husband and wife, to that of sole custody of the child to the husband. This court has a duty and obligation to protect this child. This is the very role of the court that has been emphasised by the judges in *Hadkinson*.

(d) Access is the right of a child. In this case, the child has been deprived of access to her father ie the husband herein.
This child was three years old at the time of the separation of the parties. Subsequently, the child and the husband had liberal access to each other as provided in the decree nisi, inter alia, as follows:

(a) overnight access every weekend;

(b) dinner access one day during the week;

(c) school holidays to be divided equally;

(d) access during the child's birthday;

(e) alternate public holidays of the Federal Territory of Kuala Lumpur, except Deepavali;

(f) Deepavali access;

(g) the husband's parents (ie the child's paternal grandparents) also had access on alternate Tuesdays;

The wife had stopped all access between the child and the husband (including the paternal grandparents) since January 2008, including telephone access. This is certainly unreasonable and not for the welfare of the child. The actions of the wife in disrupting and denying the access between the child and her father clearly prove that the wife does not have the welfare of the child as the paramount consideration (see *Leong Sam Moy v Low Chee Tiam* [472] MD 7; [1997] 2 CLJ Supp 212 where it was held that access is the basic right of a child, rather than that of the parent).

(e) The wife has uprooted the child from her home, family, school and friends. On 15 June 2009 the wife has, without the knowledge and/or consent of the husband, surreptitiously removed the child of the marriage out of this jurisdiction and remains out of this jurisdiction to date (see para 5 of the husband's affidavit in support affirmed on 4 November 2009).
At that time, the child was attending kindergarten in Malaysia. There is no information regarding the current arrangements on the child's education at this time.
Clearly, this child, now a six year old girl, has been deprived of her right to spend the necessary time in order to strengthen her relationship with her father, paternal grandparents, other family members and friends. The child has been drastically uprooted from her home and familiar routine and surroundings, and taken to the Middle East.

(f) The husband alleges that the wife is currently co-habiting with an unknown man who works in the Middle East (see para 11 of the

husband's affidavit in support affirmed on 4 November 2009). This is not denied by the wife. Such fact is not for the welfare of the child.

(g) It cannot be for the welfare of the child, who is merely six years of age, to be fleeing from one country to another indefinitely eg to Bangkok, Australia and now Qatar. It is for the welfare of this child that she be brought back to Malaysia, to her stable environment, where she has been living since she was born, and where she had attended school and has family and friends.

(h) It is necessary for the husband to be given lawful and sole custody of the child to enable him to obtain the recovery order under s 53 of the Child Act 2001, which are the orders sought in prayers 2, 3, 4, 5, 6 and 7(a) and (b) of the husband's application.

[31] In view of the above, it is for the welfare and in the interest of this child that sole guardianship and custody be awarded to husband.

(a) As for maintenance, upon sole guardianship and custody being granted to the husband, the consequential order that the husband ceases to pay maintenance for the child to the wife also has to be granted. There is also justification for the court to allow the husband's application to cease paying maintenance for the wife as a result of the material change in the circumstances caused by the wife in leaving the jurisdiction of the court.

[32] For the above reasons, I allowed the husband's application as stated earlier. In summary, the orders that I granted are:

(a) for sole guardianship and custody of the child to be given to the father, for the welfare and in the interest of the child;

(b) consequential orders that maintenance payments for the child and wife are to cease forthwith; and

(c) for recovery orders to ensure that the child is returned to the protective jurisdiction of this court.

Application in encl 49 allowed with costs in cause.

Reported by Andrew Christopher Simon